Shayne Corey Cahill v Kaka Singh Dhaliwal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–119 OF 2005
LOW HOP BING, RAUS SHARIF AND WAN ADNAN MUHAMAD JJCA
31 DECEMBER 2007

Administrative Law — Exercise of judicial functions — Domestic tribunal — Trained jockey found guilty and was disqualified by racing stewards of the Malaysian Racing Association — Review of decision by racing stewards after the filing of originating summons by plaintiff — Whether racing stewards were functus officio

The plaintiff a professional jockey was charged before the stipendiary stewards of the Malaysian Racing Association ('MRA') under r 144(2) and punishable under r 144(5) of the MRA Racing Rules for not taking all reasonable and permissible measures throughout the race to ensure that 'JAKISHA' (the horse he rode) was given a full opportunity of winning or of obtaining the best possible placing in that race. The plaintiff was found guilty of the said charge. He was sentenced to three years disqualification from racing. The plaintiff filed an originating summons seeking a number of declarations. On 30 June 2006, five days after filing the originating summons, the racing stewards issued a letter to the plaintiff's solicitors, admitting that they had made a mistake on the sentence imposed and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules, for the plaintiff to make further submission on the sentence. Neither the plaintiff nor his solicitors attended the hearing. Before the High Court, the argument was confined to the findings of racing stewards on the sentence imposed in the appeal for 'JAKISHA'. In his judgment the learned High Court judge accepted the defendant's admission that it had committed an error in the sentencing at the appeal. He held, however that the racing stewards had the power to correct the error by virtue of r 18(2)(c) of the MRA Racing Rules. The plaintiff had no basis to complaint. The plaintiff in this appeal had confined its submission to one single issue on whether the race meeting stewards had the jurisdiction to review their decision on the plaintiff's appeal to correct an admitted error, after the appellant had filed his originating summons in the High Court. It was the submission of the plaintiff that after the filing of the originating summons, the racing stewards were functus officio and had no jurisdiction to review their decision. The matter was firmly within the jurisdiction of the court and it was only court which had the

jurisdiction to review the findings of the racing stewards. The defendant contended that the issue raised by the plaintiff was never raised in the court below and was only raised for the first time in this appeal. Alternatively, it was the contention of the defendant that the racing stewards were not functus officio and had the jurisdiction to review their decision.

Held, dismissing the appeal:

(1) This was a case where this court should exercise its discretion, in favour of hearing the new point raised by the plaintiff. This was because the new point raised by the plaintiff was solely on the point of law, based on undisputed facts. Hence, this court should not be precluded from hearing it (see para 18).

(2) The court was of the view that the racing stewards were not functus officio and their jurisdiction had not been ousted by the filing of the originating summons. This was because the jurisdiction and function of the racing stewards were distinctly different from the jurisdiction and function of the courts. The function and jurisdiction of the courts in these type of cases was supervisory in nature. The courts were only concerned with the correctness of the decision making process, i.e. the procedure involved in the sentencing of the plaintiff, and not with the merits of the decision itself i.e. the actual sentencing. Simply put, the courts would not decide on what was the appropriate sentence for the plaintiff, which function was properly vested within the jurisdiction of the racing stewards (see para 19).

(3) The main complaint of the plaintiff as to 'JAKISHA' proceeding before the High Court was only on sentence. The racing stewards admitted their mistake and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules, for the plaintiff to make further submission on the sentence. But the plaintiff chose not to turn up at the scheduled hearing. Thus, he could not now complain and use this issue to knock out the entire disciplinary proceeding where his guilt had been proven and not challenged before the High Court (see para 22).

[Bahasa Malaysia summary

Plaintif adalah seorang penunggang kuda profesional yang dituduh sebelum pengelola Persatuan Lumba Kuda Malaysia ('MRA') di bawah peraturan 144(2) dan boleh dihukum di bawah peraturan 144(5) Peraturan Lumba Kuda MRA kerana tidak mengambil segala langkah munasabah dan dibenarkan sepanjang perlumbaan untuk memastikan bahawa 'JAKISHA' (kuda yang ditunggangnya) diberikan peluang penuh memenangi atau memperoleh kedudukan yang terbaik di perlumbaan tersebut.

Plaintif didapati bersalah atas tuduhan tersebut. Beliau digantung daripada perlumbaan selama tiga tahun. Plaintif memfailkan saman pemula menuntut beberapa deklarasi. Pada 30 Jun 2006, lima hari selepas memfailkan saman pemula, pengelola perlumbaan mengeluarkan satu surat kepada peguamcara plaintif yang mengakui kesilapan mereka dalam hukuman yang dikenakan dan memanggil plaintif menghadiri satu pendengaran semula seperti yang dibenarkan oleh Peraturan MRA, untuk plaintif membuat hujahan ke atas hukuman tersebut. Kedua-dua plaintif dan peguamcaranya tidak menghadirkan diri pada pendengaran tersebut. Sebelum Mahkamah Tinggi, hujahan adalah terbatas kepada carian pengelola perlumbaan atas hukuman yang dikenakan di rayuan untuk 'JAKISHA'. Dalam penghakimannya hakim Mahkamah Tinggi yang bijaksana menerima pengakuan defendan bahawa ia telah melakukan satu kesilapan dalam hukuman di rayuan tersebut. Akan tetapi, beliau memutuskan bahawa pengelola perlumbaan mempunyai kuasa untuk memperbetulkan kesilapan tersebut di bawah peraturan 18(2)(c) Peraturan Lumba Kuda MRA. Plaintif tidak mempunyai asas untuk mengadu. Dalam rayuan ini plaintif telah membatas hujahannya kepada hanya satu isu sama ada mesyuarat pengelola perlumbaan mempunyai bidang kuasa mengkaji semula keputusan rayuan plaintif untuk memperbetulkan satu kesilapan yang diakui, selepas perayu memfailkan saman pemulanya di Mahkamah Tinggi. Ia adalah hujahan plaintif bahawa selepas memfailkan saman pemula, pengelola perlumbaan telah menjadi functus officio dan tidak mempunyai bidang kuasa untuk mengkaji semula keputusan mereka. Perkara ini adalah dengan pastinya dalam bidang kuasa mahkamah dan ia hanya mahkamah yang mempunyai bidang kuasa mengkaji semula penemuan pengelola perlumbaan. Defendan menegaskan bahawa isu yang dibangkitkan oleh plaintif tidak pernah dibangkitkan di mahkamah bawahan dan hanya dibangkitkan kali pertamanya dalam rayuan ini. Secara alternatif, ia adalah penegasan defendan bahawa pengelola perlumbaan tidak functus officio dan mempunyai bidang kuasa untuk mengkaji semula keputusan mereka.

Diputuskan, menolak rayuan tersebut:

(1) Ini adalah satu kes di mana mahkamah ini harus menggunakan budi bicaranya, memihak satu pendengaran isu baru yang dibangkitkan oleh plaintif. Ini adalah kerana isu baru yang dibangkitkan oleh plaintif adalah semata-mata berdasarkan undang-undang, berdasarkan fakta-fakta yang tidak dipertikaikan. Dengan itu, mahkamah ini tidak patut dihalang daripada mendengarkannya.(lihat perenggan 18).

(2) Mahkamah berpendapat bahawa pengelola perlumbaan adalah tidak functus officio dan bidang kuasa mereka tidak disingkirkan dengan pemfailan saman pemula tersebut. Ini adalah kerana bidang kuasa dan

fungsi pengelola perlumbaan adalah jelas berbeza dengan bidang kuasa dan fungsi mahkamah-mahkamah. Fungsi dan bidang kuasa mahkamah-mahkamah dalam kes-kes seperti ini adalah bersifat penyeliaan. Mahkamah-mahkamah hanya mengambil berat dengan kebetulan proses membuat keputusan, iaitu prosedur yang melibatkan hukuman plaintif, dan bukan dengan merit-merit keputusan itu sendiri iaitu hukuman sebenarnya. Secara singkat, mahkamah-mahkamah tidak akan memutuskan atas apakah hukuman yang sesuai untuk dijatuhkan ke atas plaintif, di mana fungsi ini adalah secara betulnya diletakhak di dalam bidang kuasa pengelola perlumbaan (lihat perenggan 19).

(3) Aduan utama plaintif akan prosiding 'JAKISHA' sebelum Mahkamah Tinggi hanyalah atas hukuman. Pengelola perlumbaan mengakui kesilapan mereka dan memanggil plaintif menghadirkan diri pada pendengaran semula seperti yang dibenarkan oleh Peraturan MRA, untuk plaintif membuat hujahan tambahan atas hukuman tersebut. Akan tetapi plaintif pilih untuk tidak menghadirkan diri pada pendengaran yang ditetapkan. Dengan itu, beliau sekarang tidak boleh mengadu dan menggunakan isu untuk menghapuskan prosiding displin secara keseluruhan di mana kesalahannya telah dibuktikan dan tidak dicabarkan sebelum Mahkamah Tinggi (lihat perenggan 22).]

Notes

For cases on domestic tribunal, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 115–118.

Cases referred to

Baker and Wessenger, Re [1981] 125 DLR (3d) 167 (distd)
Doleman & Sons v Ossett Corporation [1912] 3 KB 257 (distd)
Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55 (refd)
Huang Han Chao v Leong Fook Meng & Anor [1991] 3 MLJ 337 (refd)
Innaya v Limbard [1963] 1 MLJ 30 (refd)
Lim Geah Liang v East West UMI Insurance [1997] 3 MLJ 517 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719 (refd)
V Letchumanan v Central Malaysia Finance Bhd [1980] 2 MLJ 96 (refd)
Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858 (distd)

Legislation referred to

Malaysian Racing Associateion Racing Rules r 144(2)

Appeal from: Originating Summons No S1–24–1148 of 2003 (High Court, Kuala Lumpur)

A

M Davis Morais (M David Morais) for the appellant.
G Rajasingam (Jason Lai with him) (Shearn Delamore & Co.) for the respondent.

B **Raus Sharif JCA (delivering judgment of the court):**

[1] This is an appeal by the plaintiff against the decision of the learned High Court judge, given on 6 January 2005 in respect of the plaintiff's originating summons dated 25 June 2003. The learned High Court judge had dismissed the plaintiff's application for the declaratory orders sought in the originating summons. On 26 September 2007 we heard and dismissed the plaintiff's appeal with costs.

[2] The plaintiff is a professional jockey from Australia. Sometime in March 2003, he applied and received the approval from Selangor Turf Club to be a visiting jockey. The Selangor Turf Club is a member of the Malaysian Racing Association ('MRA'). MRA is a body that regulates the profession and sport of horse racing in Malaysia and Singapore. The other members of MRA are Penang Turf Club, Perak Turf Club and Singapore Turf Club.

[3] On the 30 March 2003, the plaintiff rode a horse named 'KIM MUSIC'. Subsequent to the race, on 4 April 2003, he was charged before the stipendiary stewards under r 144(2) of the MRA Racing Rules. The charge was for not taking all reasonable and permissible measures throughout the race to ensure that 'KIM MUSIC' was given full opportunity of winning or obtaining the best possible placing in that race. The charge is punishable under r 144(5) of the MRA Racing Rules.

[4] The plaintiff was found guilty of the charge. He was imposed the minimum sentence of disqualification of one year from racing. Being aggrieved, the plaintiff appealed to the racing stewards as allowed under the MRA Racing Rules.

[5] On 5 April 2003, the plaintiff was granted a stay of the sentence pending hearing of his appeal before racing stewards. During the stay of the sentence, the plaintiff participated in another race. This was the 4th race held on 6 April 2003 at the Selangor Turf Club. At this race, he rode a horse named 'JAKISHA'. Subsequent to the race, on 9 April 2003, he was again charged before the stipendiary stewards. The charged was also under r 144 (2) and punishable under r 144(5) of the MRA Racing Rules. But this time, the charge was for not taking all reasonable and permissible measures throughout the race to ensure that 'JAKISHA' was given a full opportunity of winning or of obtaining the best possible placing in that race.

[6] The plaintiff was found guilty of the said charge. He was sentenced to three years disqualification from racing. The disqualification was to run consecutively after the disqualification imposed in respect of 'KIM MUSIC'. He was also fined RM50,000. Again, being aggrieved, the plaintiff appealed to the racing stewards against the said decision.

[7] Both appeals were heard by the racing stewards on 20 June 2003, and both were dismissed on the same day.

[8] On 25 June 2003, the plaintiff filed this originating summons. He sought the following orders:

(i) A declaration that the racing stewards' decision of 20.6.2003, dismissing the plaintiff's appeal against the decision of the stipendiary stewards on 4 April 2003 on the plaintiff's one-year disqualification for breaching r 144(2)of the Malayan Racing Association's ('MRA') Rules of Racing as the jockey of 'KIM MUSIC' in Race 4, 2nd Day, Sunday 20 March 2003 in the March/April 2003 Selangor Meet, and in further deciding that the sentence shall commence from the date of breach, is invalid and unenforceable because the racing stewards erred in taking the view that it is unnecessary for the stipendiary stewards to prove all the ingredients of a charge, and that as long as one ingredient of the charge is proven it is sufficient, as this is wrong in law.

(ii) A declaration that the racing stewards' decision of 20 June 2003, dismissing the plaintiff's appeal against the decision of the stipendiary stewards on 9 April 2003 on a three-year disqualification, to commence after the expiry of the 1-year disqualification for 'KIM MUSIC', that the fine of RM50,000 in relation to the plaintiff's breach of r 144(2) MRA Rules of Racing as the jockey of 'JAKISHA' in Race 4, 4th Day, Sunday 6 April 2003, of the Sultan of Selangor Gold Trophy Meet 2003 be confirmed, and that the deposit for the appeal be forfeited, is invalid and unenforceable because:

   (a) after the racing stewards dismissed the plaintiff's appeal, the racing stewards failed to give the plaintiff's solicitors an opportunity to mitigate the sentence even though in the appeal petition, the plaintiff had appealed that the sentence meted out by the stipendiary stewards is harsh and excessive, and this is a breach of natural justice;

   (b) the racing stewards erred in taking the view that it is unnecessary for the stipendiary stewards to prove all the ingredients in a charge, and that as long as one ingredient is proven, it is sufficient, and this is wrong in law; and

   (c) the racing stewards erred in law in deciding that the charge is not wrongful in law.

(iii) An order that the deposit be returned to the plaintiff.

(iv) An order for damages to be assessed and paid by the defendant to the plaintiff.

[9] On 30 June 2006, five days after filing the originating summons, the racing stewards issued a letter to the plaintiff's solicitors, admitting that they had made a mistake on the sentence imposed in the appeal in respect of 'JAKISHA'. The letter went further to inform the plaintiff that the racing stewards, who heard the appeal, wished to reconvene to review their decision on sentence and requested the plaintiff to attend this reconvened hearing and to make further submission on the sentence imposed. For ease of reference, the letter is hereby reproduced.

> Appeal by Jockey S Cahill against three (3) years disqualification and fine of RM50,000 in connection with the running and handling of 'JAKISHA' which finished 2nd in Race 4, 4th day, Sunday, 6 April 2003, Selangor March/April (Piala Emas Sultan Selangor) Meeting 2003
>
> The Race Meeting Stewards who presided at the above appeal have now resolved to re-convene to hear submissions from Mr Cahill on the appropriate sentence arising from the dismissal of the appeal lodged by him.
>
> The Race Meeting Stewards now realise that the appropriate sentence following their decision to disallow the appeal is not a mandatory three-year term as originally envisaged by them but a discretionary, as is evident from r 144(5). This is to be determined based on the facts leading to the particular conviction.
>
> Accordingly, acting under the powers conferred upon them by r 18(2)(c), the Race Meeting Stewards propose to review their own previous decision to disqualify Mr Cahill for a period of three years.
>
> This letter accordingly serves to inform you that a further hearing will be held on Friday, 4 July 2003 at 4pm at the Enquiry Room, Selangor Turf Club, where Mr Cahill can be present in person and/or with his counsel, to make submissions on the appropriate sentence to be imposed upon him pursuant to r 144(5) arising from the dismissal of his appeal against conviction in the above matter.
>
> If the date of hearing is not suitable to you, kindly notify us of a suitable date.

[10] By a letter dated 9 July 2003, the plaintiff's solicitors requested for the hearing date be fixed in the month of August. The request was accommodated by the racing stewards. In a letter dated 31 July 2003, the racing stewards informed the plaintiff's solicitors that 13 August 2003 was the new hearing date. However, neither the plaintiff nor his solicitors attended the hearing.

[11] In his application before the High Court, the plaintiff had cast his case in two parts:

(i) that the racing stewards had 'erred in law in the case of 'KIM MUSIC' and 'JAKISHA' when they did not require every ingredient in the charge to be proven'.

(ii) that in the 'JAKISHA' proceedings the racing stewards had failed to allow the plaintiff the opportunity to mitigate his sentence. A

[12] When the application was heard, the plaintiff's counsel informed the learned High Court judge that the plaintiff would not be continuing with his application in respect of the 'KIM MUSIC' proceedings. The plaintiff's counsel further informed the learned High Court Judge that in respect of 'JAKISHA' proceedings, the plaintiff would not be pursuing the contention that every ingredient in the charge was required to be proven. B C

[13] Thus, before the High Court, the argument was confined to the findings of racing stewards on the sentence imposed in the appeal for 'JAKISHA'. In his judgment the learned High Court judge accepted the defendant's admission that it had committed an error in the sentencing at the appeal. He held, however that the racing stewards have the power to correct the error by virtue of r 18 (2) (c) of the MRA Racing Rules. The plaintiff had no basis to complaint. D

[14] However, before us, the plaintiff had confined its submission to one single issue: E

> whether the Race Meeting Stewards have the jurisdiction to review their decision on the plaintiff's appeal to correct an admitted error, after the appellant had filed his originating summons in the High Court. F

[15] It is the submission of the plaintiff that after the filing of the originating summons on 25 June 2003, the racing stewards were functus officio and had no jurisdiction to review their decision. The matter was firmly within the jurisdiction of the court and it was only court which had the jurisdiction to review the findings of the racing stewards. The racing stewards' jurisdiction has been ousted by the filing of the originating summons. In support, the plaintiff's counsel cited case authorities, *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858, *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 and *Re Baker and Wessenger* [1981] 125 DLR (3d) 167. G H

[16] The defendant contended that the issue raised by the plaintiff was never raised in the court below and was only raised for the first time in the appeal herein. Thus, it should not be entertained. Alternatively, it is the contention of the defendant that the racing stewards were not functus officio and had the jurisdiction to review their decision. The authorities cited by plaintiff's counsel, are distinguishable. I

A

FINDINGS

(i) Raising a point not raised in the court below

B

[17] The general rule is that an issue which was not raised in the court below cannot be raised on appeal (*Innaya v Limbard* [1963] 1 MLJ 30; *V Letchumanan v Central Malaysia Finance Bhd* [1980] 2 MLJ 96). However, as an appeal is conducted by way of a re-hearing, an appellate court retains the discretion as whether to entertain a point raised for the first time on appeal (*Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55; *Huang Han Chao v Leong Fook Meng & Anor* [1991] 3 MLJ 337; *Lim Geah Liang v East West UMI Insurance* [1997] 3 MLJ 517). In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 Gopal Sri Ram JCA held that the categories of cases in which an appellate court will admit a new point not raised in the court below are not closed.

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[18] It is our respectful view that this is a case where we should exercise our discretion, in favour of hearing the new point raised by the plaintiff. This is because the new point raised by the plaintiff is solely on the point of law, based on undisputed facts. Hence, this court should not be precluded from hearing it.

E

(ii) Were the racing stewards functus officio and had no jurisdiction to review their own decision the moment the originating summons was filed?

F

[19] The plaintiff's position is that the moment the originating summons was filed, the racing stewards were functus officio and had no jurisdiction to review their decision. With respect, we disagree. We are of the view that the racing stewards were not functus officio and their jurisdiction has not been ousted by the filing of the originating summons. This is because the jurisdiction and function of the racing stewards are distinctly different from the jurisdiction and function of the courts. The function and jurisdiction of the courts in these type of cases is supervisory in nature. The courts are only concerned with the correctness of the decision making process, ie the procedure involved in the sentencing of the plaintiff, and not with the merits of the decision itself ie the actual sentencing. Simply put, the courts will not decide on what is the appropriate sentence for the plaintiff, which function is properly vested within the jurisdiction of the racing stewards.

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[20] It is in this respect that the cases of *Wah Bee Construction Engineering, Doleman & Sons*, and *Re Baker* relied by the defendant can be distinguished. Whilst is not disputed that the courts in those cases held that the arbitral tribunals were functus officio once the matters were properly before the

courts, one must understand the rationale behind those decisions in that there cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. Those cases concern the jurisdiction of the court as against the jurisdiction of the arbitral tribunal pursuant to an arbitration agreement. In such cases, once both parties have elected to have their disputes adjudicated in court, the court is properly seized with the exact jurisdiction as the arbitral tribunal in deciding the rights of the parties. The courts therein do not merely exercise a supervisory jurisdiction.

[21] It is for those reasons that the courts in *Wah Bee Construction, Doleman & Sons* and *Re Baker* decided that the arbitral tribunals were functus officio, as one cannot have two tribunals deciding the same overlapping issues. In the present case there is no question of whether the High Court is deciding on the same issues as the racing stewards. Hence, it is our respectful view that the racing stewards were not functus officio notwithstanding the filing of the originating summons.

[22] In any event, as stated earlier, the function of the courts in these types of cases is supervisory in nature. In this case, the main complaint of the plaintiff as to 'JAKISHA' proceeding before the High Court was only on sentence. The racing stewards admitted their mistake and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules, for the plaintiff to make further submission on the sentence. The racing stewards even accommodated the request by the plaintiff for an adjournment. But the plaintiff chose not to turn up at the scheduled hearing. Thus, he could not now complain and use this issue to knock out the entire disciplinary proceeding where his guilt has been proven and not challenged before the High Court. At best, we can remit the case to the racing stewards to hear further submission on sentence and to impose the appropriate sentence on the plaintiff. But that was exactly what the racing stewards sought to do four years ago but was refused by the plaintiff. Hence, we see no purpose of sending the case back to the racing stewards to hear further submission by the plaintiff on the sentence.

[23] For the above reasons, we unanimously dismissed the plaintiff's appeal with costs. Deposit to the defendant towards account of taxed costs.

Appeal dismissed.

Reported by Sally Kee